

**IN THE UNITED STATES MILITARY COMMISSION
AT U.S. NAVAL BASE, GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

IBRAHIM AHMED MAHMOUD AL QOSI

)
)
) **PROSECUTION**
) **RESPONSE TO DEFENSE**
) **MOTION FOR ORAL**
) **DEPOSITIONS**
)

) 27 September 2004
)

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Relief Requested. That the Defense requests for deposition be denied.

3. Facts. The Prosecution does not dispute the factual assertions contained in paragraphs 1 and 2 of their Motion, with the following exception: the Accused has been detained as an enemy combatant in Guantanamo Bay, Cuba, since early 2002. On 3 July 2003, the Accused was determined to be subject to the President's Military Order of 13 November 2001. We will address paragraphs 3 and 4 below.

4. Legal Authority Cited

- a. Military Commission Order (MCO) No. 1;
- b. Military Commission Instruction (MCI) No. 2.

5. Discussion

a. The Prosecution concurs with the Defense that the Presiding Officer has the authority, on behalf of the Commission, to order what amounts to an oral deposition. MCO No. 1, paragraph 6(A)(5). It is less clear that the Commission has the power to compel the presence of former top U.S. officials at such depositions. Regardless, the Prosecution objects to the requested depositions, as the Defense has failed to make a sufficient showing that they are required for a full and fair trial.

b. Standard

(1) MCO No. 1 provides, "The Accused may obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available as determined by the Presiding Officer." Hence, as the moving party, the Defense has the burden of demonstrating that the requested depositions are necessary for a full and fair trial. The Defense has failed to so demonstrate.

(2) The Defense references Rule for Courts-Martial (RCM) 702 in its Motion. This provision is not applicable to military commissions, but if it is going to be cited, out of completeness, RCM 702(a) states that a deposition may be ordered when “*due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.*”¹ RCM 702(c)(3)(A) does state that “a request for a deposition may be denied only for good cause,” but the Discussion notes that good cause for denial includes “failure to state a proper ground for taking a deposition; failure to show the probable relevance of the witness’ testimony; or that the witness’ testimony would be unnecessary.” Even were this court-martial standard to be applied, the depositions still should be denied.

c. Armed Conflict

(1) Litigating whether the Accused committed acts “in the context of armed conflict” does not require resort to depositions of former Presidents and Secretaries of State. Such a step would be extraordinary, and there is no demonstration that it is necessary.

(2) First, there is no evidence that the testimony of these particular former high-level officials is necessary. There are alternatives that first should be explored, such as public documents and statements of U.S. officials accessible to both the Prosecution and Defense that can illuminate what the U.S. position was with regard to al Qaida.

(3) Second, the element “in the context of and associated with armed conflict” can be met irrespective of a formal policy decision or declaration of the United States. Pursuant to MCI No. 2:

The focus of this element is not the nature or characterization of the conflict, but the nexus to it. This element does not require a declaration of war, ongoing mutual hostilities, or confrontation involving a regular national armed force. A single hostile act or attempted act may provide sufficient basis for the nexus so long as its magnitude or severity rises to the level of an ‘armed attack’ or an ‘act of war,’ or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiate or contribute to such hostile act or hostilities would satisfy the nexus requirement.²

(4) Hence, the focus is not on U.S. policymakers, but on the actions and intent of al Qaida. There is no indication that depositions of these individuals will lead to evidence that al Qaida did *not* intend to wage war against the United States or was *not* engaged in hostile actions against the United States.

d. Requested Deposition of Major General Miller. Relevant to the voluntariness of the Accused’s admissions are means and methods of interrogation *actually employed*

¹ Rule for Courts-Martial 702(a), Manual for Courts-Martial (2002 ed.)(emphasis added)

² MCI No. 2, Section 5C

on the Accused. The Defense does not assert, nor is there any reasonable basis to believe, that Major General Miller had any direct, personal knowledge or involvement with the interviews of the Accused. Accordingly, the requested deposition of him should be denied. A deposition should not be used as a fishing expedition with a former Commander, Joint Task Force, Guantanamo regarding general policies.

6. Attached Files. None.

//Signed//

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Lieutenant Colonel, U.S. Marine Corps
Prosecutor